(1) While the Department of Justice will generally defer to the employee's choice of counsel, the Department must approve in advance any private counsel to be retained under this section. Where national security interests may be involved, the Department of Justice will consult with the agency employing the federal defendant seeking representation.

(2) Federal payments to private counsel for an employee will cease if the private counsel violates any of the terms of the retention agreement or the Department of Justice.

(i) Decides to seek an indictment of, or to file an information against, that employee on a federal criminal charge relating to the conduct concerning which representation was undertaken;

(ii) Determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment;

(iii) Resolves any conflict described herein and tenders representation by Department of Justice attorneys;

(iv) Determines that continued representation is not in the interest of the United States;

(v) Terminates the retainer with the concurrence of the employee-client for any reason.

(d) Where reimbursement is provided for private counsel fees incurred by employees, the following limitations shall apply:

(1) Reimbursement shall be limited to fees incurred for legal work that is determined to be in the interest of the United States. Reimbursement is not available for legal work that advances only the individual interests of the employee.

(2) Reimbursement shall not be provided if at any time the Attorney General or his designee determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment or that representation is no longer in the interest of the United States.

(3) Reimbursement shall not be provided for fees incurred during any period of time for which representation by Department of Justice attorneys was tendered.

(4) Reimbursement shall not be provided if the United States decides to seek an indictment of or to file an information against the employee seeking reimbursement, on a criminal charge relating to the conduct concerning which representation was undertaken.

[Order No. 970–82, 47 FR 8174, Feb. 25, 1982, as amended by Order No. 1409–90, 55 FR 13130, Apr. 9, 1990]

§ 50.17 *Ex parte* communications in informal rulemaking proceedings.

In rulemaking proceedings subject only to the procedural requirements of 5 U.S.C. 553:

(a) A general prohibition applicable to all offices, boards, bureaus and divisions of the Department of Justice against the receipt of private, *ex parte* oral or written communications is undesirable, because it would deprive the Department of the flexibility needed to fashion rulemaking procedures appropriate to the issues involved, and would introduce a degree of formality that would, at least in most instances, result in procedures that are unduly complicated, slow, and expensive, and, at the same time, perhaps not conducive to developing all relevant information.

(b) All written communications from outside the Department addressed to the merits of a proposed rule, received after notice of proposed informal rulemaking and in its course by the Department, its offices, boards, and bureaus, and divisions or their personnel participating in the decision, should be placed promptly in a file available for public inspection.

(c) All oral communications from outside the Department of significant information or argument respecting the merits of a proposed rule, received after notice of proposed informal rulemaking and in its course by the Department, its offices, boards, bureaus, and divisions or their personnel participating in the decision, should be summarized in writing and placed promptly in a file available for public inspection.

(d) The Department may properly withhold from the public files information exempt from disclosure under 5 U.S.C. 552.

(e) The Department may conclude that restrictions on *ex parte* communications in particular rulemaking proceedings are necessitated by considerations of fairness or for other reasons.

[Order No. 801–78, 43 FR 43297, Sept. 25, 1978, as amended at Order No. 1409–90, 55 FR 13130, April 9, 1990]

§ 50.18 [Reserved]

§ 50.19 Procedures to be followed by government attorneys prior to filing recusal or disqualification motions.

The determination to seek for any reason the disqualification or recusal of a justice, judge, or magistrate is a most significant and sensitive decision. This is particularly true for government attorneys, who should be guided by uniform procedures in obtaining the requisite authorization for such a motion. This statement is designed to establish a uniform procedure.

(a) No motion to recuse or disqualify a justice, judge, or magistrate (*see, e.g.*, 28 U.S.C. 144, 455) shall be made or supported by any Department of Justice attorney, U.S. Attorney (including Assistant U.S. Attorneys) or agency counsel conducting litigation pursuant to agreement with or authority delegated by the Attorney General, without the prior written approval of the Assistant Attorney General having ultimate supervisory power over the action in which recusal or disqualification is being considered.

(b) Prior to seeking such approval, Justice Department lawyer(s) handling the litigation shall timely seek the recommendations of the U.S. Attorney for the district in which the matter is pending, and the views of the client agencies, if any. Similarly, if agency attorneys are primarily handling any such suit, they shall seek the recommendations of the U.S. Attorney and provide them to the Department of Justice with the request for approval. In actions where the United States Attorneys are primarily handling the litigation in question, they shall seek the recommendation of the client agencies, if any, for submission to the Assistant Attorney General.

(c) In the event that the conduct and pace of the litigation does not allow sufficient time to seek the prior written approval by the Assistant Attorney General, prior oral authorization shall be sought and a written record fully reflecting that authorization shall be subsequently prepared and submitted to the Assistant Attorney General.

(d) Assistant Attorneys General may delegate the authority to approve or deny requests made pursuant to this section, but only to Deputy Assistant Attorneys General or an equivalent position.

(e) This policy statement does not create or enlarge any legal obligations upon the Department of Justice in civil or criminal litigation, and it is not intended to create any private rights enforceable by private parties in litigation with the United States.

[Order No. 977–82, 47 FR 22094, May 21, 1982]

§ 50.20 Participation by the United States in court-annexed arbitration.

(a) *Considerations affecting participation in arbitration.* (1) The Department recognizes and supports the general goals of court-annexed arbitrations, which are to reduce the time and expenses required to dispose of civil litigation. Experimentations with such procedures in appropriate cases can offer both the courts and litigants an opportunity to determine the effectiveness of arbitration as an alternative to traditional civil litigation.

(2) An arbitration system, however, is best suited for the resolution of relatively simple factual issues, not for trying cases that may involve complex issues of liability or other unsettled legal questions. To expand an arbitration system beyond the types of cases for which it is best suited and most competent would risk not only a decrease in the quality of justice available to the parties but unnecessarily higher costs as well.

(3) In particular, litigation involving the United States raises special concerns with respect to court-annexed arbitration programs. A mandatory arbitration program potentially implicates the principles of separation of powers, sovereign immunity, and the Attorney General's control over the process of settling litigation.